

Council Senate Members
TOM BECK
VICE-CHAIRMAN
B.F. "CHRIS" CHRISTIAENS
MACK COLE
DEBBIE BOWMAN SHEA
BRUCE D. CRIPPEN
STEVE DOHERTY

Executive Director
ROBERT B. PERSON

Legal Services Director
GREGORY J. PETESCH

Legal Researcher
DOUG STERNBERG



Council House Members
WILLIAM "RED" MENAHAN
CHAIRMAN
EMILY SWANSON
KARL OHS
MARK NOENNIG
BILLIE I. KRENZLER
PAUL SLITER

Attorneys
BARTLEY J. CAMPBELL
LEE HEIMAN
VALENCIA LANE
JOHN MACMASTER
EDDYE MCCLURE
DAVID S. NISS

Montana Legislative Services Division

Legal Services Office
PO BOX 201706
Helena, Montana 59620-1706
(406) 444-3064
FAX (406) 444-3036

April 4, 2000

TO: Eminent Domain Subcommittee of the Environmental Quality Council

FROM: Greg Petesch *GP*

RE: Clear and Convincing Evidence

The Subcommittee has asked for information concerning the differing evidentiary standards, particularly the clear and convincing evidence standard. Evidentiary standards concern the level or burden of proof that must be satisfied in a particular type of proceeding. There are three basic evidentiary standards. The easiest standard to satisfy is the preponderance of evidence standard that traditionally applies in most civil cases. The next highest standard is the clear and convincing evidence standard that applies in civil cases in which the Legislature specifically requires that standard. The highest standard is the beyond a reasonable doubt standard that applies in criminal matters. These three standards are the standards applied by District Courts. If a District Court's decision is appealed, the Montana Supreme Court has adopted a substantial evidence standard to determine whether the District Court's determination was correct. The review standard will be separately addressed later in this paper.

In most civil matters the burden of proof is a "preponderance of the evidence". *Black's Law Dictionary*, 6th Ed. (1990), defines a preponderance of evidence as evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it. With respect to the burden of proof in civil cases, the term means the greater weight of evidence or evidence that is more credible and convincing to the mind. The term is also defined as the degree of proof that is more probable than not.

In criminal matters, the burden of proof is "beyond a reasonable doubt". *Black's* defines that standard as fully satisfied, entirely convinced, or satisfied to a moral certainty. In certain types of civil proceedings, the Legislature has required a "clear and convincing" evidentiary standard. *Black's* defines that standard as proof that results in reasonable certainty of the truth of the ultimate fact in controversy. The term means proof that requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. The term is further defined as stating that clear and convincing proof will be shown when the truth of the facts asserted is highly probable.

Montana courts have traditionally followed the defined evidentiary standards. In Fleming v. Lockwood, 36 Mont. 385, 92 P. 962 (1907), concerning damages for ditch seepage, the Supreme Court determined that the District Court had erred in giving an instruction requiring that damages had to be established by a "clear preponderance of the evidence". The Court noted that in using the word "clear" the District Court attempted to impose a greater burden on the plaintiff than the law required. The Fleming case followed Gehlert v. Quinn, 35 Mont. 451, 90 P. 168 (1907), involving the conversion of property, in which the Supreme Court held that an instruction requiring fraud to be "clearly and distinctly proven" was erroneous because the term meant something more than proven by a preponderance of the evidence. The instruction would vary the rule of law laid down by statute requiring only a preponderance of the evidence. The Court noted that courts in other states had held that in certain civil actions a higher quality of proof is required than in others, but that was not the rule in Montana.

The "clear and convincing" standard is used in 51 sections of the Montana Code Annotated, while a "preponderance" of evidence is used in 71 sections. Obviously, the Legislature has now chosen to require a higher level of proof in certain civil actions. However, the only instance in which the Legislature has attempted to define the "clear and convincing" standard is in the area of assessing punitive damages.

Section 27-1-221(5), MCA, concerning punitive damages provides:

All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

The language in section 27-1-221(5), MCA, concerning the standard of proof for punitive damages, was interpreted by the Montana Supreme Court in Cartwright v. Equitable Life Assurance, 276 Mont. 1, 914 P.2d 976 (1996), involving alleged misrepresentations and fraud by an insurance agent. In that case, the Supreme Court noted that in civil cases, it reviews a jury's findings to determine whether there was substantial evidence to support those findings. The Court also noted that the substantial evidence standard of review is normally applied to situations in which the burden of proof is satisfied by a preponderance of the evidence. The Court also

noted that it had not previously analyzed whether actions that must be proven by clear and convincing evidence should be subject to review by something more than substantial credible evidence. The Court stated that it had upheld jury verdicts that awarded punitive damages when the verdict was supported by substantial evidence. See King v. Zimmerman, 266 Mont. 54, 878 P.2d 895 (1994), and Dees v. American National Fire Insurance Company, 260 Mont. 431, 861 P.2d 141 (1993). The Court then held that it would apply the substantial evidence test to punitive damage awards. In Cartwright, the evidence indicated that the agent told the Cartwrights that they would have to pay only three premiums on a whole life insurance policy and that the policy would then be self-supporting. The agent told the Cartwrights that he would take care of the additional premium notices without notifying them that he was getting the insurer to make loans against the policy. Four other individuals testified that the agent had made similar representations concerning policies. Another agent for the insurer indicated that his investigation of complaints did not find any refuting evidence concerning the complaints. The second agent concluded that the selling agent had engaged in a regular practice of destroying the value of people's life insurance in order to sell them more life insurance. The Supreme Court concluded that the evidence supporting the punitive damage award was substantial credible evidence and that the evidence was clear and convincing.

In Cartwright, the Supreme Court also stated that in cases terminating parental rights, which are statutorily required to be based upon clear and convincing evidence, it had applied the substantial evidence standard of review. See In re S.C., 264 Mont. 24, 869 P.2d 266 (1994), and In re F.M., 248 Mont. 358, 811 P.2d 1263 (1991). However, in In re J.L., D.L., and A.G., 277 Mont. 284, 922 P.2d 459 (1996), involving the termination of parental rights, the Montana Supreme Court adopted the holding of a Kansas case concerning clear and convincing evidence. In that case, it held that clear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. The Kansas court noted that the quality of proof is somewhere between a mere preponderance but not beyond a reasonable doubt.

In a case involving an appeal from an administrative determination of a collective bargaining unit, the Montana Supreme Court noted that section 2-4-704(2)(a)(v), MCA, provides that factual findings may be overturned when they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record". The Court noted that prior interpretations of this standard were inconsistent. The Court then stated that if there is substantial credible evidence in the record, the findings are not clearly erroneous. If the record contains support for the factual determinations made by the agency, the courts may not weigh the evidence. The courts are bound by the agency findings. City of Billings v. Billings Firefighters Local No. 521, 200 Mont. 421, 651 P.2d 627 (1982). The same standard of review was applied to an agency review of a hearings officer's finding of fact in a sexual discrimination claim before the Montana Human Rights Commission in Moran v. Shotgun Willies, 270 Mont. 47, 889 P.2d 1185 (1995).

In Miller v. Frasure, 248 Mont. 132, 809 P.2d 1257 (1991), a workers' compensation case, the Montana Supreme Court followed Barrett v. Asarco, 245 Mont. 196, 799 P.2d 1078 (1990), and stated that substantial evidence necessary to support a finding of fact must be more than a scintilla, but may be somewhat less than a preponderance of evidence. Although it may be based on weak and conflicting evidence, in order to rise to the level of substantial evidence, it must be greater than trifling or frivolous. The Miller holding was followed in State v. Shodair Hospital, 273 Mont. 155, 902 P.2d 21 (1995), concerning reimbursement for a psychiatric patient's treatment.

Based upon the incidence of the terms "clear and convincing evidence" and "preponderance of the evidence" in the Montana Code Annotated, the Legislature has dramatically changed the statutory requirement since 1907. It is abundantly clear that when the Legislature uses the term "clear and convincing evidence" the Legislature intends that the level of proof be higher than the level of proof required under the "preponderance of evidence" standard that is traditionally applicable to civil cases. The determination of whether sufficient evidence has been introduced in order to meet the required level of proof is determined by the District Court. If the District Court's determination is appealed, the Montana Supreme Court has traditionally reviewed the record to determine if the record contains substantial credible evidence. However, based upon the holdings in Cartwright and In re J.L., the review will now determine whether the record contains substantial evidence that is clear and convincing.

CI2255 0095gpxa.